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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 841

TOMMIE E. L. WILLIAMS,
Petitioner,

VERSUS

CITY OF OKLAHOMA CITY, ET AL.,
Respondents.

On Writ of Certiorari to the Court of Criminal Appeals of Oklahoma

BRIEF OF RESPONDENTS

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February, 1969

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. CE 5-0030

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QUESTION PRESENTED

Should the Rule announced in *Griffin* v. *People of Illinois,* 351 U.S. 12, be extended to encompass appeals from convictions of violating Municipal Ordinances, and, if so, should it be applied to the case at bar?

ARGUMENT

I.

The Rule Announced in the Griffin Case Should Not Be Extended to Encompass Violations of Municipal Offenses.

The maximum penalty that can be imposed on Petitioner or any other individual found guilty of violating a Municipal Ordinance in Respondent City is a fine of $100.00 or imprisonment not to exceed 90 days, or both such fine and imprisonment (Appendix A—Petitioner's Brief p. 42).

As pointed out in the recent case of *Duncan* v. *State of Louisiana,* 88 S.Ct. 1444, there is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provisions and should not be subject to the Fourteenth Amendment jury trial requirements; crimes carrying possible penalties up to six months do not require jury trial if they otherwise qualify as petty offenses.

In the Federal System petty offenses are defined as those punishable by no more than six months in prison and a $500.00 fine (18 U.S.C. 1).

In the cases of *District of Columbia* v. *Clawans,* 57 S.Ct. 660, and *Cheff* v. *Schnackenberg,* 86 S.Ct. 1523, this Court generally held that the penalty authorized for a particular crime is of major relevance in determining whether the crime is serious or petty.

The lack of seriousness of the offense in question is shown by the fact that transcripts are provided as Petioner says "automatically if the penalty increases" (Petitioner's Brief p. 19) and yet the Legislature in Oklahoma has not seen the necessity to provide case-made at public expense in cases involving Municipal Offenses.

The right to trial by jury is infinitely more fundamental to American Jurisprudence than the right of appellate review.

If a rational line of demarcation can be drawn between serious and petty offenses relative to the granting or withholding of the right to jury trial, why should not the same reasoning apply to the case at bar?

II.

Limitation of the Griffin Rule

In the case of *Griffin* v. *People of Illinois*, 351 U.S. 12, and subsequently in *Eskridge* v. *Washington State Board of Prison Terms and Paroles*, 357 U.S. 214, this Court established the law relative to the right of every individual to an adequate record for appellate review of his conviction.

Admittedly those cases dealt with convictions of offenses defined as felonies.

In the case at bar the Petitioner was found guilty by a jury of an offense of violating a City Ordinance held by the Oklahoma Court of Criminal Appeals to be quasi criminal in nature and often referred to as a petty offense (A. 10-11).

The question before the Appellate Court below was one of first impression. Candor compels acknowledgment that a similar question was presented to the Appellate Courts of California on three separate occasions. In the case of *Hidalgo* v. *Municipal Court*, 277 P.2d 36 (1954) the Writ of Mandate commanding the preparation of a transcript at public expense was denied. It is noted, however, that this case was decided almost two years before the Griffin Rule was announced by this Court. In the other two cases, *Preston* v. *Municipal Court*, 10 Cal. Reptr. 301 (1961) and *In re Henderson*, 393 P.2d 685 (1964) the California Courts, in substance, held that under certain circumstances indigent petitioners are entitled to reporter's transcript without charge.

Respondents contend, however, that *Griffin, supra, Eskridge, supra, Hidalgo, supra, Preston, supra,* and *In re Henderson, supra,* acknowledge certain application of limitations to the Griffin Rule and that they do not require that a case-made (reporter's transcript) be furnished at public expense in all cases, but only in those cases wherein to deny the record would in effect impose penalty by denying right to appeal to one who by reason of poverty is unable to provide the record.

Other limitations[1] to the application of the Griffin Rule have been announced by Courts in several jurisdictions. The Supreme Court of Washington in *Grady* v. *Schneckloth,* 314 P.2d 930 (1957) and in *Ross* v. *Rhay,* 318 P.2d 975 (1957) held that where an indigent defendant had prepared a narrative statement of facts which would have been sufficient to obtain a review, but failed to heed the suggestion of the Chief Justice that it be filed and certified, Griffin did not require the state to supply a free stenographic transcript. Decisions to the same effect have been rendered by the Supreme Court of Tennessee in *Beadle* v. *State,* Tenn., 310 S.W.2d 157, and the Supreme Court of North Dakota in *State* v. *Moore,* 82 N.W.2d 217.

Another limitation of the application of the Griffin Rule is that an indigent petitioner is not entitled to a free transcript where it is determined that the appeal is frivolous. This limitation was announced by Justice Frankfurter in his concurring opinion at 351 U.S. page 24.

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[1] See discussion pages 76-78. The Impact of Griffin v. Illinois on State Court-Federal Court Relationships by Honorable Frederick G. Hamley, United States Circuit Judge, 24 Fed. Rules Dec. 75.

Also we note in the case of *Leyvas* v. *United States*, 264 F.2d 272 (1958) the Ninth Circuit Court held that a defendant in a Federal criminal prosecution is not entitled to a daily typewritten transcript at public expense.

III.

Griffin Rule Not Applicable to Case at Bar

Where two methods of review are available and each appears capable of producing an adequate record, one of which is by means of a statement of evidence in narrative form to be prepared by counsel, or by the court, and the other by means of case-made to be furnished at public expense, does a petitioner have an absolute right by reason of poverty to select the method most expensive to the public?

Is it sufficient for the Petitioner and his counsel to simply allege that they are unable to prepare from memory a complete transcript of the record and thereby relieve themselves of the responsibility of making any effort to do so?

Respondents urge that the answer to each question is negative and that it is not oppressive nor repugnant to the Constitution of the United States to require an indigent, who seeks a free case-made, to sustain the burden of showing that no alternative mode of appellate review is adequate or available.

What constitutes an adequate record will, of necessity, vary in content from case-to-case depending upon the complexities of same.

Respondents contend that a statement of evidence in narrative form could produce an adequate record for review in the instant case.

In the case at bar the Petitioner and his counsel, who incidentally is a paid employee of the Legal Aid Society of Oklahoma County, Inc., and by reason thereof suffers no financial loss by reason of his representation of this Petitioner, simply allege that they are unable to prepare from memory a complete case-made; but the record shows no effort was made to do so.

In the case of *Harris* v. *State,* 137 Pac. 365, 369, 139 Pac. 846, the Court of Criminal Appeals of Oklahoma said:

> "* * * if for any reason the stenographer's notes could not be obtained, that then it was the duty of such lawyers to use their best exertion to make up a casemade from memory, and, if they failed to do so, the defendant would be held responsible for this neglect of duty on their part. Also, see Dobbs v. State, 5 Okl. Cr. 475, 114 Pac. 358, 115 Pac. 370. The writer of this opinion practiced law many years in Texas before court stenographers were known in that state, and when, under the law, the evidence had to be written out as a matter of memory by the attorneys and filed in court within ten days from the adjournment of the term of court. The writer never had the least difficulty in preparing his statements of the evidence in his cases, and he knows from personal experience that it can easily be done. In fact he seriously doubts if the employment of court stenographers is at all necessary either in the administration of justice or to the development of lawyers. It has a tendency to breed carelessness on their part; but, be this as it may, the trial court has a large discretion as to when to order the stenographer's notes to be extended without ex-

pense to a defendant, and this discretion will not be reviewed, unless it clearly appears from the record that it was arbitrarily used or abused."

In a case now pending on Petition for Certiorari before this Court—*Byers* v. *City of Oklahoma City, et al.*, No. 652 Misc. O.T. 1968, in which a motion to consolidate that case with the instant case is still pending, we have a situation similar to the one we have here, wherein counsel here, who is also counsel there, makes the identical allegation—that they are unable to prepare from memory a complete case-made and yet counsel for Petitioner proceeded to do so. He prepared a Partial Transcript of Testimony and Proceedings at Jury Trial and same was approved by the court and counsel.

He elected, however, not to perfect his appeal on this record but did instead proceed by way of a Petition for a Writ of Mandamus.

The evidence and testimony deemed necessary by Petitioner in order to properly present his case on appeal are set forth at page three of reporter's transcript of the proceeding on "Application for a Casemade at Public Expense," a copy of which is attached to Respondents' Brief in Opposition as Appendix A.

It consists of testimony of three of the City's witnesses, the affidavit of the person who, it is alleged, was driving the car and the testimony of the Petitioner. Surely the Petitioner's testimony could be prepared in narrative form, and the affidavit of the person who allegedly drove the car has already been obtained. So, only the testimony of the three City witnesses remains to be supplied. This case was

tried in one day and no allegations are made that the testimony dealt with complex matters.

Perhaps the parties have been careless with their use of the words "case-made" and "transcript." Although these words may have been used interchangeably in the briefs, they are not interchangeable under the law in Oklahoma.

In *Bennett* v. *State,* 152 P.2d 388, in Syllabus No. 2 by the Court, the Court of Criminal Appeals of Oklahoma said:

> "2. A 'case-made' consists of those things which transpired in court during the trial and which are not a part of the record, while a 'transcript of the record' contains everything of which the clerk is required to make a record."

With this distinction in mind we direct the Court's attention to the language of the trial court in its Journal Entry Overruling Defendant's Application for Case-Made at Public Expense (A. 4):

> "2 The questions raised by defendant's appeal cannot be presented to the proper Appellate Court, by an appeal by Transcript of Record, but must be presented by the preparation of at least a partial casemade herein."

We submit that the court's intent and meaning is quite clear. The court is saying that records made by the Clerk are not in themselves sufficient to present an adequate record for appellate review. Respondents have never contended that they are, but we do submit and contend that a statement of the evidence in narrative form in lieu of a case-made would produce an adequate record for appellate review.

Petitioner has submitted several affidavits of people purporting to have knowledge of certain facts germane to the case at bar. These people did not testify at the trial so obviously a copy of the case-made, regardless of who pays for it, could not reproduce their testimony. Petitioner, therefore, contends that it is perfectly acceptable to present this evidence in narrative form. How, then, could Petitioner be prejudiced by offering in narrative form the testimony of the witnesses who did testify at the trial where their testimony was heard by the court and counsel and was tested in the fire of cross-examination?

IV.

The Application of the Griffin Rule to Quasi Criminal and Petty Offenses Will Add Additional Burden to the Municipal Court System.

Petitioner calls the Court's attention to one objection which Respondents have not raised heretofore (Petitioner's Brief p. 24). Respondents have not raised this objection for the simple reason that the *present* Municipal Court of Record was established by Ordinance duly adopted December 27, 1967,[2] and, therefore, sufficient evidence is not available to evaluate the total impact an adverse ruling would have on the already taxed Court System.

However, since Petitioner has raised the issue Respondents would like to correct any misconception that might arise in the minds of some by reason of the Statement of Revenue attached to Petitioner's Brief as Appendix

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[2] Certified copy of Ordinance No. 11839 adopted by Oklahoma City Council, December 27, 1967 (Appendix A, pp. i-v).

B. It is totally erroneous to say that the operation of the Municipal Court System produces a net profit of one million dollars.

As pointed out at footnote 23, page 25 of Petitioner's Brief, the cost of personal services of the Police Department and the Assistant City Attorneys are not included in the Statement of Revenue. Surely Petitioner does not contend that these are not proper items of expense chargeable to the operation and administration of the Municipal Court System as are the costs of acquisition, operation and maintenance of the many pieces of equipment utilized in the enforcement of the Municipal Ordinances.

Admittedly the application of the Griffin Rule will add additional burden to the Municipal Court System. How much, is speculative.

CONCLUSION

For the reasons stated, Respondents respectfully submit that the judgment of the Court of Criminal Appeals of the State of Oklahoma should be affirmed, or, in the alternative, be remanded for a more complete determination of need.

Respectfully submitted,

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February, 1969

APPENDIX A

(72055A)

(Published in the Daily Law Journal-Record

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ORDINANCE NO. 11,839

AN ORDINANCE PROVIDING FOR THE ESTABLISHMENT OF MUNICIPAL COURTS; SETTING FORTH JURISDICTION OF COURTS; PROVIDING FOR THE QUALIFICATION AND APPOINTMENT OF JUDGES AND SPECIAL JUDGES AND THE SELECTION OF A PRESIDING JUDGE; DESCRIBING DUTIES OF PRESIDING JUDGE; DEFINING TERMS; REQUIRING ATTENDANCE AT COURTS; ESTABLISHING PROCEUDRE FOR COURTS; REPEALING SECTIONS 1 THROUGH 9, BOTH INCLUSIVE, CHAPTER 1, TITLE 8, REVISED ORDINANCES OF OKLAHOMA CITY, 1960, AND ALL ORDINANCES AND RESOLUTIONS OR PARTS THEREOF IN CONFLICT HEREWITH; PROVIDING FOR INDEXING OF THIS ORDINANCE AND DECLARING AN EMERGENCY.

Emergency Ordinance

BE IT ORDAINED BY THE COUNCIL OF THE CITY OF OKLAHOMA CITY:

SECTION 1. Indexing. The following sections shall be indexed as Sections 1 through 9, Chapter 1, Title 8, Revised Ordinances of Oklahoma City, 1960, as amended:

8.1.01 Courts Created:

The Municipal Courts of the City shall consist of the following:

(a) Court of Record

(b) Criminal Court

(c) Traffic Court

(d) Such other Courts as may hereafter be established.

8.1.02 Jurisdiction of Courts:

(a) The Court of Record shall have such jurisdiction as provided by the laws of the State of Oklahoma;

(b) The Criminal Court shall have jurisdiction over the trial of all cases arising out of violations of the general municipal ordinances other than those pertaining to traffic;

(c) The Traffic Court shall have jurisdiction over the trial of all cases arising out of violations of the municipal traffic ordinances, or the general ordinances where such offense is connected with a traffic violation;

(d) Upon the creation of an additional court, the Council shall by ordinance name the court and establish its jurisdiction.

(e) Until such time as juries are provided for the Criminal Court and the Traffic Court, no charges shall be filed in either of these court divisions where the prescribed penalty exceeds a fine and costs of $20.00.

8.1.03 Appointment and Qualifications of Judges.

(a) The Council shall appoint a minimum of three (3) Judges who shall serve as judges of all the Municipal Courts. One judge shall be the Municipal Judge and the other judges shall be Associate Municipal Judges;

(b) Each Judge shall have had prior to his appointment a minimum of four years experience as a licensed practicing attorney, or as a judge of a court of record, or both, within the State of Oklahoma; shall continue to be a licensed attorney while in office and possess the qualifications set forth in the Charter and Personnel Resolution of The City of Oklahoma City.

8.1.04 Special Judges.

The Council shall appoint a minimum of five (5) Special Judges who shall possess the same qualifications as the Municipal Judges and shall act as Municipal Judge during the absence, illness or disqualification of a Municipal Judge.

8.1.05 Construction.

Whenever in the present Charter, its amendments, or in the general ordinances of the City, the words "Municipal Judge" are used, said words shall refer to the Judges of all the Municipal Courts, unless express provision is elsewhere made to the contrary.

8.1.06 Presiding Judge; Selection of

The Council shall select a Presiding Judge from among the Municipal Judges.

8.1.07 Duties of Presiding Judge.

In addition to his regular duties as a Municipal Judge, the presiding judge shall:

(a) Assign cases from the various Municipal Courts among the Judges as he deems best.

(b) Assign duty to one or more Special Judges in case of the absence or inability of any of the Municipal Judges.

(c) Promulgate uniform rules of procedure for the operation of all Municipal Courts.

(d) Act as the Department Head.

(e) Review the list of Special Judges annually or at sooner intervals as may be necessary and recommend appointments to the Council.

(f) On or before the tenth day after the end of each month make a report to the Council detailing the activities of the Municipal Courts during the preceding month.

(g) Perform such other acts as required to execute the ordinances and resolutions of the City, the City Charter and the Statutes of the State.

(h) "Nothing in the ordinance shall be construed as encroaching in any manner upon the duty, obligation and power of the judges of the Municipal Courts to be the sole judge of the merits of the respective cases before them and to render their judgmnts accordingly."

8.1.08 Police and Other Officers to Attend.

The Chief of Police, in person or by his assistant, shall attend all sessions of said court, and shall be present in person or by his assistant at the opening of each session. Policemen shall attend the session when the business of the court requires their attendance. An Assistant Municipal Counselor may attend sessions and represent the City of Oklahoma City in all matters before said Court, when requested by the Mayor, Manager or Chief of Police and so assigned by the Municipal Counselor.

8.1.09 Procedure.

(a) The procedure in the Court of Record shall be in accordance with the applicable provisions of the Constitution and laws of the State of Oklahoma and such cases made and provided.

(b) The procedure in the Criminal Court and Traffic Court shall be as set forth in Title 8, Chapter 1, Sections 10 through 13 and 24 through 28, Oklahoma City Revised Ordinances, 1960.

SECTION 2. Repealer. Sections 1 through 9, both inclusive, Chapter 1, Title 8, Revised Ordinances of Oklahoma City, 1960, are hereby repealed; Resolutions previously adopted by the Council of The City of Oklahoma City on June 8, 1965, September 15, 1965, and January 25, 1966, pertaining to Municipal Courts and Judges thereof are repealed insofar as the provisions thereof conflict with this

ordinance; all other ordinances and resolutions or parts thereof in conflict herewith are hereby repealed.

SECTION 3. Severability. If any section, sub-section, sentence, clause, phrase, or portion of this Ordinance is, for any reason, held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed a separate distinct and independent provision and such holding shall not affect the validity of the remaining portions of this Ordinance.

SECTION 4. Emergency. WHERAS, it being immediately necessary for the preservation of the peace, health and safety of Oklahoma City and the inhabitants thereof that the provisions of this Ordinance shall take effect and be in full force from and after the date provided herein, as provided by law.

INTRODUCED and read in open meeting of the Council of The City of Oklahoma City, Oklahoma, on the 27th day of December, 1967.

PASSED by the Council of the City of Oklahoma City, Oklahoma, on the 27th day of December, 1967.

APPROVED by the Mayor of The City of Oklahoma City, Oklahoma, on the 27th day of December, 1967.

JAMES H. NORICK,
Mayor.

(Seal)

Attest: E. RAY LONG,
City Clerk.